A

PENDAFTAR HAKMILIK, PEJABAT TANAH DAN GALIAN NEGERI SELANGOR v. BANK PERTANIAN MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
ROHANA YUSUF JCA
B PRASAD SANDOSHAM ABRAHAM JCA
[CIVIL APPEAL NO: W-01(NCVC)(W)-84-03-2014]
16 FEBRUARY 2016

C ***PUBLIC AUTHORITIES:*** *Registrar of titles – Breach of statutory duty – Negligence – Transfer of lands – Whether illegal, null and void – Duty and powers of registrar of titles – Whether administrative in nature – Duty of care – Whether breached – Whether transfer of lands used fake land titles – Whether inference could be drawn that fake computerised documents of title was issued by Land Office – Whether appellant acted in bad faith – Reinstatement of true registered owner as*
D *lawful owner of lands – Whether appellant merely following previous court order – Whether liability could be imputed to appellant – Whether appellant could seek protection under s. 22 of National Land Code*

LAND LAW: *Transfer of land – Registrar of Titles – Breach of statutory duty – Negligence – Whether transfer illegal, null and void – Duty and powers of appellant*
E *– Whether administrative in nature – Duty of care – Whether arose – Whether transfer of lands used fake land titles – Whether inference could be drawn that fake computerised documents of title was issued by Land Office – Whether appellant acted in bad faith when accepting instruments as fit for registration – Reinstatement of true registered owner as lawful owner of lands – Whether appellant merely*
F *following previous court order – Whether liability could be imputed to appellant – Whether appellant could seek protection under s. 22 of National Land Code*

Ulu Selangor Estate Sdn Bhd ('USESB'), the original lawful and registered proprietor of two parcels of freehold land, Lot 886 and Lot 887 ('the said lands'), entered into a sale and purchase agreement with Magna Iron Sdn Bhd
G ('MISB') for the sale of the said lands. MISB had taken out a loan in the sum of RM19.7 million from Bank Pertanian Malaysia Berhad ('the respondent'). As security, the said land was charged to the respondent under two charges which were accordingly registered by the Pendaftar Hakmilik Pejabat Tanah Dan Galian Dalam Negeri Selangor ('the appellant'). The respondent
H subsequently released the loan sum to USESB. Pursuant to the presentation of the memorandum of transfer and the charges on 23 June 2008, a new computerised grant of title was issued by the land office showing MISB as the new registered proprietor and that the lands were charged to the respondent. Meanwhile, USESB, the true registered owner, had entered into
I a sale and purchase agreement with a third party for the sale and purchase of five parcels freehold land belonging to it and including the two lots charged to the respondent. It was discovered that the two lots had been transferred unlawfully to MISB. Thus, USESB filed a civil suit ('Suit 278')

against the appellant for, *inter alia*, a declaration that the memorandum of transfer registered on 23 June 2008 was illegal, null and void and of no effect and for the appellant to reinstate USESB as the registered and lawful owner of the two lots of land. In Suit 278, USESB claimed that the transfer of the two lots to MISB was done using fake land titles as the original issued documents of title ('IDT') of the two lots were still with USESB. The court allowed the claim by USESB in Suit 278 and granted the declaration sought. Following the court's order, the charge that was registered in favour of the respondent was struck off and removed from the registration by the appellant. The respondent then commenced a suit against, *inter alia*, the appellant, and claimed alleged negligence and breach of statutory duty. The High Court found for the respondent and ordered the appellant to pay the respondent RM19.7 million in damages and loss. Hence, this appeal by the appellant. The appellant submitted that (i) in exercising its duty under the National Land Code ('NLC'), the powers of the appellant was limited by s. 303, therefore, there was no duty of care owed to the respondent; (ii) liability could not be imputed to the appellant because in cancelling the registration of the charge and the transfer and in restoring the true registered owner to the register, the appellant was simply carrying out the court's order in Suit 278; (iii) the inference drawn by the trial judge that the fake computerised IDT was issued by the staffs or servants of the appellant was unsustainable and not supported by evidence; and (iv) the appellant had not acted in bad faith.

Held (allowing appeal with costs)
Per Abdul Aziz Abdul Rahim JCA (for the majority):

(1) The appellant was not and could not be said to be responsible for the accuracy of the particulars in the instruments – be it charge documents or memorandum of transfers – presented to his office for registration. The appellant was not required to go behind the memorandum of transfer presented and investigate to satisfy himself that the name of the transferor or transferee stated in the memorandum of transfer was the correct party. What was required of the appellant in such circumstances was to ensure that particulars of the transferor and of the land to be transferred match exactly the particulars printed on the IDT presented together with the memorandum of transfer for purpose of registration. Once the appellant is satisfied the instrument is fit for registration and of their accuracy, his duty then is to register the instruments and to ensure that those exact particulars are entered into the register, which will then become public record. It was in this light that the duty of the appellant in registering the charge and the transfer in this instant case was administrative in nature. (para 30)

(2) The questionable and impugned computerised IDTs that were presented to the appellant at the time of registration had the name of the true registered owner USESB printed on it. Therefore, there was no valid ground for the appellant to suspect that the computerised IDT (title in

continuation) for the two lands had not been printed because the original plan for the original computer issued title for the two lands were still in the appellant's strong room. Thus, it was reasonable for the appellant to take at face value that the computerised IDT for the two lands that were presented at his office, together with the other instruments for registration, were the two computerised IDTs properly and lawfully printed and issued by his office. Further, the mere fact that the impugned IDTs were printed on security paper that were kept in the appellant's strong room which was inaccessible to outsiders, was insufficient to draw a conclusion that the appellant was negligent to allow the impugned IDTs to be printed on the said security paper. It was also not viable to draw the inference that the printing and the issuing of the impugned IDTs was done by the appellant's servants or officers. There should be more cogent and concrete evidence to draw such inference. There must be established some foundation evidence on all these matters before such assumption could be made justifiable. (paras 33-40)

(3) Under s. 214A of the NLC, it is a joint obligation of both the transferor and the transferee to submit for and obtain the approval or consent of the Estate Land Board before making dealings with the estate land. The transaction, including the preparation of documentations and the search at the Land Registry, was handled by solicitors engaged by the respondent. Thus, when the solicitors presented the instruments for registration, the appellant could reasonably expect the documentation to have been properly done; and after checking the particulars in the instruments presented for registration against the information pertaining to the lands to be registered in the computerised land registration system and found them to be exactly the same, the appellant had accepted the instruments as fit for registration. In the circumstances, it could not be said that the appellant had acted in bad faith. (para 51)

(4) The appellant had no intention, in causing the instruments to be registered, to defraud the true registered land owner, USESB, or to cause loss or injury to the respondent. Similarly, when the appellant had to cancel the respondent's registered charge, the appellant was merely carrying out what he was directed to do by the court's order in Suit 278. In the circumstances, the appellant herein could seek protection under s. 22 of the NLC. (para 52)

Per Prasad Sandosham Abraham JCA (dissenting):

(1) Section 301(b) read together with s. 302(i) of the NLC requires a degree of enquiry from the appellant which clearly was absent in this case. The law requires that the appellant exercise its power judiciously and reasonably which they have not done. If, as it was in this case, the respondent could prove as they had done so, that the appellant should have complied with the 14th Schedule of the NLC, to protect members of the public such as the respondent when dealing with the registry of

the appellant and that the respondent had suffered a greater and more substantial damage than members of the public, the respondent should succeed in a plea for breach of statutory duty. Herein, all the ingredients for breach of statutory duty had been made out (paras 24-30)

(2) The original title held by USESB was valid. There was no evidence to suggest that a notice had been sent to USESB to surrender its existing title in exchange for the computerised title. The computerised title was to be a title in continuation. There was therefore no continuation within the context of the 14th schedule of the NLC. Thus, the appellant was negligent and in breach of its duty of care to the respondent. (para 28)

(3) The balance of the scales of justice comes down in favour of imposing a duty of care on the appellant to the respondent for otherwise the consequences would be more dire than any compensation to be paid out by the appellant, if the confidence of the public in the veracity of particulars at the Land Registry was eroded significantly. The appellant could not avail themselves to the protection under s. 22 of the NLC as there had been a glaring absence of good faith (para 36)

Bahasa Malaysia *Headnotes*

Ulu Selangor Estate Sdn Bhd ('USESB'), pemilik berdaftar yang sah dan asal ke atas dua bidang tanah pegangan bebas, iaitu Lot 886 dan 887 ('tanah tersebut') memasuki satu perjanjian jual beli dengan Magna Iron Sdn Bhd ('MISB') untuk jualan tanah tersebut. MISB memperolehi pinjaman berjumlah RM19.7 juta daripada Bank Pertanian Malaysia Berhad ('responden'). Sebagai sekuriti, tanah tersebut digadaikan kepada responden di bawah dua gadaian yang didaftarkan oleh Pendaftar Hakmilik Pejabat Tanah Dan Galian Dalam Negeri Selangor ('perayu'). Responden kemudiannya mengeluarkan jumlah pinjaman kepada USESB. Menurut pembentangan memorandum pemindahan dan gadaian pada 23 Jun 2008, geran hak milik berkomputer baru telah dikeluarkan oleh pejabat tanah yang menunjukkan bahawa MISB adalah berdaftar baharu dan bahawa tanah-tanah tersebut digadaikan kepada responden. Sementara itu, pemilik USESB iaitu pemilik berdaftar sebenar, memasuki satu perjanjian jual beli dengan pihak ketiga untuk pembelian dan jualan lima bidang tanah pegangan bebas yang dimilikinya termasuk dua bidang tanah yang digadaikan kepada responden. Didapati bahawa kedua-dua lot tersebut telah dipindahkan secara salah kepada MISB. Oleh itu, USESB memfailkan tindakan guaman ('Guaman 278') terhadap perayu untuk, antara lain, pengisytiharan bahawa memorandum pindahan yang didaftarkan pada 23 Jun 2008 menyalahi undang-undang, tidak sah dan terbatal serta tidak mempunyai kesan dan agar perayu menempatkan semula USESB sebagai pemilik yang berdaftar dan sah atas kedua-dua bidang tanah itu. Dalam Guaman 278, USESB mendakwa bahawa pemindahan dua bidang tanah itu ke MISB dilaksanakan dengan penggunaan hak milik tanah palsu kerana dokumen asal yang dikeluarkan

A ('IDT') dua bidang tanah itu masih dalam pegangan USESB. Mahkamah membenarkan tuntutan USESB dalam Guaman 278 dan membenarkan pengisytiharan yang dipohon. Mengikut perintah mahkamah, gadaian yang didaftarkan memihak kepada responden dibatalkan dan disingkirkan daripada pendaftaran oleh perayu. Responden kemudiannya memulakan
B guaman terhadap, antara lain, perayu dan mendakwa kecuaian dan pelanggaran kewajipan statutori. Mahkamah Tinggi memutuskan memihak kepada responden dan memerintahkan supaya perayu membayar responden RM19.7 juta untuk ganti rugi. Oleh itu, rayuan ini oleh perayu. Perayu menghujahkan bahawa (i) dalam menjalankan tugasnya di bawah Kanun
C Tanah Negara ('KTN'), kuasa perayu dihadkan oleh s. 303, dengan itu, tiada kewajipan berhati-hati kepada responden; (ii) liabiliti tidak boleh dikaitkan dengan perayu kerana apabila perayu membatalkan pendaftaran gadaian dan pemindahan dan dalam mendaftarkan pemilik berdaftar sebenar, perayu hanya menjalankan perintah mahkamah dalam Guaman 278;
D (iii) inferens yang dibuat oleh hakim bicara bahawa IDT berkomputer yang palsu dikeluarkan oleh pekerja perayu tidak mapan dan tidak disokong oleh keterangan; dan (iv) perayu tidak bertindak dengan niat jahat.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Aziz Abdul Rahim HMR (keputusan majoriti):

E **(1)** Perayu tidak dan tidak boleh dikatakan bertanggungjawab atas ketepatan butir-butir dalam instrumen – sama ada bayaran dokumen gadaian atau dokumen pemindahan – yang dikemukakan di pejabatnya untuk pendaftaran. Perayu tidak perlu menyiasat memorandum pemindahan yang dibentangkan untuk memuaskan hatinya bahawa nama pemindah
F atau penerima pindahan yang dinyatakan dalam memorandum pemindahan adalah pihak yang benar. Apa yang perlu dibuat oleh perayu dalam keadaan sebegini adalah memastikan bahawa butir-butir pemindah tanah dan tanah yang dipindahkan berpadanan tepat butir-butir yang dicetak atas IDT yang dibentangkan bersama dengan
G memorandum pemindahan untuk tujuan pendaftaran. Apabila perayu berpuas hati dengan ketepatan instrumen itu dan kesesuaiannya untuk pendaftaran, tanggungjawabnya adalah mendaftarkan instrumen itu dan memastikan bahawa butir-butir tersebut dimasukkan ke dalam pendaftaran, yang kemudiannya menjadi rekod awam. Dengan itu,
H tanggungjawab perayu dalam mendaftarkan gadaian tersebut dan pemindahan dalam kes ini adalah bersifat administratif.

(2) IDT berkomputer yang dipersoalkan dan dipertikaikan yang dikemukakan kepada perayu pada waktu pendaftaran mempunyai nama pemilik berdaftar sebenar USESB tercetak padanya. Oleh itu, tiada
I alasan yang sah untuk perayu mengesyaki bahawa IDT berkomputer (hak milik berdaftar bagi perlanjutan tanah) untuk kedua-dua tanah itu tidak dicetak kerana rancangan asal untuk hak milik asal berkomputer untuk kedua-dua tanah itu masih berada dalam bilik kebal perayu. Oleh

itu, adalah munasabah untuk perayu mengambil dari nilai muka bahawa IDT berkomputer untuk kedua-dua tanah itu yang dibentangkan di pejabatnya, bersama-sama dengan instrumen lain untuk pendaftaran, adalah dua IDT berkomputer yang telah dengan betul dan mengikut undang-undang dicetakkan dan dikeluarkan oleh pejabatnya. Tambahan, lagi fakta semata-mata bahawa IDT yang dipertikaikan itu dicetak atas kertas sekuriti yang disimpan dalam bilik kebal perayu yang tidak boleh diakses kepada orang luar, adalah tidak memadai untuk membuat kesimpulan bahawa perayu cuai dalam membenarkan IDT yang dipertikaikan dicetakkan atas kertas sekuriti tersebut. Inferens bahawa percetakan dan pengeluaran IDT yang dipertikaikan dikeluarkan oleh pekerja-pekerja atau pegawai-pegawai perayu juga tidak boleh dicapai. Keterangan yang lebih kukuh dan konkrit harus wujud untuk mencapai inferens itu. Satu dasar keterangan harus ditubuhkan atas perkara-perkara ini sebelum anggapan sebegitu boleh dipertahankan.

(3) Di bawah s. 214A KTN, menjadi tanggungjawab bersama kedua-dua pemindah dan penerima pindahan untuk mengemukakan dan memperolehi kelulusan atau persetujuan Lembaga Tanah Estet sebelum berurusan dengan tanah estet. Transaksi, termasuk penyediaan dokumen dan pencarian di Pejabat Pendaftaran Tanah, dikendalikan oleh peguam-peguam yang dilantik oleh responden. Oleh itu, apabila peguam-peguam mengemukakan instrumen untuk pendaftaran, perayu semunasabahnya boleh menjangkakan dokumentasi dibuat dengan teratur; dan selepas menyemak butir dalam instrumen yang dibentangkan untuk pendaftaran dengan maklumat berhubungan dengan tanah-tanah yang didaftarkan dalam sistem pendaftaran tanah berkomputer dan mendapati bahawa ia adalah sama, perayu telah menerima instrumen sebagai sesuai untuk didaftarkan. Dalam keadaan itu, tidak boleh dikatakan bahawa perayu telah bertindak dengan niat jahat.

(4) Perayu tidak mempunyai niat, dalam mendaftarkan instrumen, untuk menipu pemilik berdaftar yang benar, USESB, atau untuk menyebabkan kerugian atau kerosakan kepada responden. Begitu juga, apabila perayu membatalkan gadaian berdaftar responden, perayu hanya menjalankan tugasnya seperti yang diperintahkan oleh mahkamah dalam Guaman 278. Dalam keadaan sebegini, perayu boleh memohon perlindungan di bawah s. 22 KTN.

Oleh Prasad Sandosham Abraham HMR (menentang):

(1) Seksyen 301(b) yang dibaca bersama-sama dengan s. 302(i) KTN memerlukan tahap penyelidikan tertentu daripada perayu yang dengan jelasnya tidak berlaku dalam kes ini. Undang-undang memerlukan perayu melaksanakan kuasanya dengan munasabah dan dengan tidak sewenang-wenangnya, sesuatu yang gagal dilakukan di sini. Jika, seperti dalam kes ini, responden boleh membuktikan bahawa perayu harus

mematuhi Jadual 14 KTN, untuk melindungi orang awam seperti responden apabila berurusan dengan pendaftaran perayu dan bahawa responden telah mengalami kerugian yang lebih besar dan lebih teguh daripada anggota orang awam, responden harus berjaya dalam rayuan pelanggaran kewajipan statutori. Di sini, bahan-bahan pelanggaran kewajipan statutori telah dibuktikan.

(2) Hak milik asal yang dipegang oleh USESB adalah sah. Tiada keterangan yang mencadangkan bahawa satu notis telah dihantar kepada USESB untuk menyerah hak miliknya untuk ditukar ke hak milik berkomputer. Hak milik berkomputer adalah hak milik dalam lanjutan. Dengan itu tiada lanjutan dalam konteks Jadual 14 KTN. Perayu cuai dan telah melanggar kewajipan berjaga-jaga kepada responden.

(3) Imbangan keadilan memihak kepada mengenakan kewajipan berjaga-jaga ke atas perayu kepada responden kerana jika tidak, akibat akan lebih dasyat daripada sebarang pampasan untuk dibayar oleh perayu, jika keyakinan orang awam dalam kebenaran butir-butir yang terdapat di Pejabat Pendaftaran Tanah terhakis dengan ketara. Perayu tidak boleh melindungi dirinya di bawah s. 22 KTN kerana terdapat niat jahat yang begitu menonjol sekali.

Case(s) referred to:

AR PL Palaniappa Chettiar v. PL AR Letchumanan Chettiar & Anor [1981] 1 LNS 160 ***(refd)***

Atkinson v. Newcastle and Gateshead Waterworks Co (1877) LR 2 Ex D 441 ***(refd)***

Benjamin v. Storr (1874) LR 9 CP 400 ***(refd)***

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***

David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Ors [2009] 3 CLJ 771 HC ***(refd)***

Government of the State of Sabah v. Syarikat Raspand [2010] 7 CLJ 945 CA ***(refd)***

Hu Sepang v. Inspector Keong On Eng & Ors [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739 HC ***(refd)***

Kumpulan Perubatan (Johor) Sdn Bhd v. Dr Mohd Adnan Sulaiman & Anor [2015] 1 CLJ 471 CA ***(refd)***

London Passenger Transport Board v. Upson [1949] AC 155 ***(refd)***

Poh Yang Hong v. Ng Lai Yin & Ors [2013] 8 CLJ 964 HC ***(refd)***

Pow Hing & Anor v. Registrar of Titles, Malacca [1980] 1 LNS 120 FC ***(refd)***

Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC ***(refd)***

Toh Huat Khay v. Lim A Chang [2010] 7 CLJ 261 FC ***(refd)***

Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 3 CLJ 271 HC ***(dist)***

X (minors) v. Bedfordshire County Council [1995] 3 All ER 353 ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666 CA ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, ss. 5, 6

National Land Code, ss. 16(2), 22, 214A(4), 297, 298, 301(b), 302(1), 303, 321, Fourteenth Schedule reg. 8(1)

For the appellant - Ahmad Fuad Othman; State Legal Advisor's Office, Selangor
For the respondent - Navamalar Ganesan (Syamsul Azhar Ab Aziz & Aimi Shazwani Yaakob with him); M/s Jasbeer Nur & Lee

[Editor's note: For the High Court judgment, please see Bank Pertanian Malaysia v. Zulpadli Mohammad & Ors [2012] 10 CLJ 248 (overruled)]

Reported by Suhainah Wahiduddin

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] This appeal was heard and disposed on 23 April 2015, wherein the appeal of the appellant was allowed by a majority of the court. I dissented and dismissed the appeal with costs. I now append below my grounds of judgment.

Material Facts

[2] By a letter of offer dated 20 May 2008, the respondent had approved a loan facility to a company known as Magna Iron Sdn Bhd (Co. No: 547575-M) (hereinafter referred to as "MISB") for a sum of RM19,700,000 to finance the purchase of the land known as:

(a) Geran 53020, Lot No. 886 (formerly known as Certificate of Title No. 13133 Mukim Rasa, District of Ulu Selangor in the State of Selangor measuring approximately 98,0349 hectares (242.061 acres) and;

(b) Geran 53021 Lot No. 886, formerly known as Certificate of Title No. 13134) Mukim Rasa, District of Ulu Selangor in the State of Selangor Darul Ehsan measuring approximately 226,4213 hectares (569064 acres) (hereinafter referred to collectively as "the said land") from Ulu Selangor Estates Sdn Bhd (hereinafter referred to as "USESB") (see pp. 362-373 core bundle).

[3] USESB was the lawful and registered proprietor of the said land.

[4] As security for the said loan, MISB had charged the said land to the respondent and guaranteed the repayment of amounts outstanding as consideration for the loan granted. (See pp. 382-414 core bundle).

[5] The respondent had appointed Messrs Zulpadli & Edham through a letter of appointment dated 20 May 2008 for the preparation and execution of the financing and charge documents for the said land (see pp. 374-377 core bundle).

[6] On 23 June 2008, Messrs Zulpadli & Edham as solicitors acting for the respondent had presented and registered the transfer documents to MISB and charge on behalf of the respondent to the appellant *vide* presentation No: 57242/2008 and 57243/2008 and the documents were duly registered by the appellant (see pp. 420-421 core bundle).

[7] Borang 16A and the charge annexure was also presented and registered in favour of the respondent *vide* presentation No. 57243/2008.

[8] As all the documents had been successfully registered by the appellant, the loan sum of RM19,700,000 was released to USESB *vide* their solicitors (see pp. 490-491 core bundle).

[9] Pursuant to the presentation of the memorandum of transfer and charge on 23 June 2008, a new grant of title was issued by the appellant *vide* the Land Office on 28 August 2008 reflecting MISB as the new registered proprietor and that the respondent was the chargee.

[10] Subsequently the original registered owner USESB filed a suit at the Kuala Lumpur High Court (Suit No. 53-21-278-2008) against MISB, the respondent and the appellant and other parties wherein the original owner of the said land, USESB applied for a declaration that the registration of the title and charge is illegal, null and void and had to be struck out from the register document of title and to restore USESB's position as the registered proprietor replacing MISB.

[11] USESB contended that there was neither approval nor consent from the Estate Land Board pursuant to s. 214A of the National Land Code (NLC) and this meant that the registration of title and charge in favour of the respondent was null and void and the transfer of the said land was effectuated by fraud as the original titles to the said land are still with USESB.

[12] USESB had obtained judgment in default on 30 October 2009, in the presence of the appellant wherein the learned High Court Judge ruled that the computerised document of title for the said land registered in the name of MISB be struck off from the register of titles and as a consequence of that, the charge in favour of the respondent was also removed by the Registrar of Titles by the appellant.

[13] These material facts are contained in the agreed facts and cover much common ground between the parties (see pp. 61-64 core bundle).

The Respondent's Case In The High Court

[14] The respondent's case is encapsulated in paras. 35 to 38 of their statement of claim (pp. 39-42, rekod rayuan Bahagian A & B).

[15] The appellant denies any negligence or that a duty of care is owed by the appellant to the respondent. At any rate the appellant had acted within the bounds of the relevant provisions of the National Land Code and that at all material times had acted in good faith.

[16] The learned High Court Judge found that the appellant was negligent and ruled accordingly. It is to be noted that this finding was in essence a finding of fact.

[17] The appellant appealed against the order of the High Court dated 14 December 2014.

The Appeal

[18] Before I proceed to deal with the issues raised in this appeal, it must be borne in mind, the respondent's main thrust in its pleaded case was a breach of statutory duty and/or negligence, although the submissions and the grounds of judgment have focussed mainly on the issue of negligence.

First Issue: Whether The Respondent Had Failed To Name The Proper Tortfeasor In Its Plea Of Negligence And Or Breach Of Statutory Duty

[19] Based on the cases cited and having referred to s. 5 and s. 6 of the Government Proceedings Act, the officer who allegedly committed the tort and the Government must be named as parties as the Government is vicariously liable and as the respondent had failed to do so that the action should be struck out *in limine* and on that ground alone, the appeal should be allowed. (See *Government of the State of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945).

[20] With respect, I do not agree. For purposes of a matter where the provisions of the National Land Code (Act 56 of 1965) applies, s. 16 of the said Act was the governing provision. To my mind s. 16(2) of the Act which I now quote:

> 16. Actions by and against the State Authority.
>
> (2) Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office.

[21] It is clear in terms that the action must be brought against the State Director in the name of his office. The effect of this provision has been clearly explained in the case of *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666 a decision of this court and referring to para. (2) of the case and I quote:

> [2] **It is clear from s. 16(2) of the National Land Code that the state authority is to be impleaded in a suit or other proceeding by citing the state director as a party.** Further, it is not in dispute that the second respondent, the state director, was a defendant in the action, the state authority was therefore a party to the action by virtue of s. 16(2) of the Code.
>
> (emphasis added).

I find that the pleadings of the respondent in this case have correctly described the appellant ie, the State Director and therefore I am unable to agree with the argument of the appellant on the issue of 'proper party' that should be named in this action.

A ***Second Issue: Whether The National Land Code Required The Appellant To Act Purely In An Administrative Capacity***

[22] In this regard, the said land had been designated as estate land, and any transfer of the same would have required the approval of the Estate Land Board which was never obtained in this case. (See s. 214A of the National B Land Code). Yet the appellant saw it fit to register the said land without the approval of the Estate Land Board. Evidenced by a certificate of approval as provided for in that section by looking at the acreage of the land and its land use, it should have been abundantly clear to the appellant to check whether a certificate of approval had been obtained from the Estate Land C Board. The appellant at the very least should have been put on guard to check and the appellant cannot be heard to say under the National Land Code, all the appellant needed to do was to act in a purely administrative fashion and nothing else.

[23] Turning to the question of title to the said land upon registration of the D said land, a new computerised title was issued to the said land which was later impugned. The issue of a new computerised title is governed by the Fourteenth Schedule of the National Land Code. It is clear that in this case, reg. 8 of the said Schedule had not been complied with as USESB had possession of the original issue document of title. The same remains in the E safe of the respondent. Can the appellant act mechanically being oblivious to these critical data that was readily available to them.

[24] The appellant relied on s. 321 of the National Land Code to justify the manner in which the appellant determined whether the impugned documents were fit for registration and that decision is purely administrative. However F I am of the view that s. 301(b) read together with s. 302(1) of the National Land Code requires a degree of enquiry from the appellant which clearly was absent in this case. There was sufficient evidence to put the appellant on notice ie, approval of the Estate Land Board and whether the impugned title had been issued in accordance with the law. I refer to the decision in the case G of *AR PL Palaniappa Chettiar v. PL AR Letchumanan Chettiar & Anor* [1981] 1 LNS 160; [1982] 1 MLJ 232 at p. 234, which I quote from the judgment of Wong Kim Fatt JC (as he then was).

> It is clear that under the Code the Registrar may act on his own motion or upon information or request made to him. The word "may" indicates H a discretion on the part of the Registrar. He is not bound to act on such information or request in every case. Thus in the case of an entry of a Registrar's caveat, the Registrar is said to perform a quasi-judicial function in the exercise of that discretion, but the discretion must always be exercised judiciously or reasonably and in good faith, not arbitrarily nor in bad faith. By contrast, in the case of an application for the entry of a I private or lien-holder's caveat, his function is purely ministerial or administrative. In other words, in the last two categories of cases, he must enter the caveats, provided the applications are in the proper forms and accompanied by the prescribed fees.

It is therefore clear that in our present case the law requires that the appellant exercise its power judiciously and reasonably which they have not done.

[25] Section 302(1) clearly provides for the appellant to take a more proactive stance in carrying out their statutory duties and the facts in this case clearly warrant the same.

[26] An action for breach of statutory duty must not be confused with an action for negligence. I can do no better than to quote Lord Wright in the case of *London Passenger Transport Board v. Upson* [1949] AC 155 at p. 168 and I quote:

> … a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common Law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty … it is not a claim in negligence in the strict or ordinary sense … At the same time it resembles actions in negligence in that the claim is based on a breach of a duty … whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim.

It is clear the same alleged wrong entitles a plaintiff to institute a claim for breach of statutory duty and negligence in the alternative, as they are two distinctive causes of action.

[27] The elements to satisfy the tort of breach of duty are as follows:

a) The injury suffered by the plaintiff is within the ambit of the statute;

b) The statutory duty imposes a liability to civil action;

c) The statutory duty is not fulfilled; and

d) The breach of the statutory duty has caused his injury.

(See *Hu Sepang v. Inspector Keong On Eng & Ors* [1991] 2 CLJ 999; [1991] 2 CLJ (Rep) 739; [1991] 1 MLJ 440).

The Injury Suffered By The Plaintiff Is Within The Ambit Of The Statute

[28] The Fourteenth Schedule of the National Land Code clearly provides the method and procedure that the appellant should take to ensure the veracity of computerised titles issued by the appellant. The Fourteenth Schedule does not provide for sanction for non-compliance of the same. However as can be seen in this case non-compliance has led to a disastrous effect. In the computerised title issued over the said land which was relied by the appellant to create a charge and dispersed its loan to the borrower is void in law as the original title remains in the hands of the original registered

proprietor, USESB. The evidence of the appellant clearly shows that no attempt was made by the appellant to ensure this statutory safeguard under the Fourteenth Schedule had been complied with.

[29] It is therefore my view that this gives the right to the respondent to pursue the civil action for the breach of statutory duty. I refer to the judgment of His Lordship Justice Abdoolcader in the case of *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155 and I quote:

> In tune with the prelude with which we commenced at the outset, we would by way of postlude in restating the message this decision delivers enjoin every official concerned with or involved in exercising powers and duties under the Code and related legislation to regard this judgment as a regrettably necessary but solemn caveat, giving warning, loud and clear, against any wanton disregard or sloppy application of express statutory provisions in the exercise of their functions, and one to be understood, marked and digested as such. We would add that they must strive to be *au fait* with the law they have to administer and should not hesitate in the course of their statutory duties to seek legal advice whenever necessary from the State Legal Adviser or his confreres and should never put the latter in the invidious and perhaps even intolerable position they found themselves in these proceedings of having both in the court below and before us to make feeble attempts at *ex post facto* justification for the inexcusable defaults of others on a *post hoc ergo* propter hoc premise, quite apart from unnecessarily constraining the justly aggrieved to pit themselves in curial combat against the massive and bottomless purse of the State? much to the delight, perhaps, of the legal profession.

In my view the relevant provision of the National Land Code imposes a duty on the appellant towards users of the appellant's registry generally. It is also my view that the respondent is within the class protected under the statute. I cannot imagine the respondent to be held to be a group of persons without rights in view of the huge financial loss the respondent has incurred as a consequence of the breach of the statutory duty by the appellant. If, as it is in this case, the respondent can prove as they have done that the appellant should have complied with the Fourteenth Schedule of the National Land Code to protect members of the public such as the respondent when dealing with the registry of the appellant and that the respondent has suffered a greater and more substantial damage than members of the public, the respondent should succeed in a plea for breach of statutory duty. (See *Atkinson v. Newcastle and Gateshead Waterworks Co* (1877) LR 2 Ex D 441; *Benjamin v. Storr* (1874) LR 9 CP 400).

[30] In the light of the aforesaid, it is my view that the respondent has successfully maintained a plea for breach of statutory duty and on that ground alone the appeal should be allowed as all the ingredients for breach of statutory duty has been made out.

Plea Of Negligence

[31] The appellant raises the fundamental question of whether the appellant owed a duty of care to the respondent. I have had cause to rule on this matter in the case of *Uptown Properties Sdn Bhd. v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271; [2012] 8 MLJ 713, which was upheld by the Court of Appeal and I set out paras. 26, 27, 28 (CLJ); paras. 28, 29, 30 (MLJ) of my earlier judgment. I therefore hold the appellant owed a duty of care in law to the respondent.

> [26] The maintenance of a land registry that is efficient and maintains accurate particulars is a duty that the first defendant owes to every member of the public who makes and relies on a search made at the land registry maintained by the first defendant. If this confidence is jeopardised that could have dire consequences for trade and economic activity in this country.
>
> [27] By analogy I refer to the decision of the Court of Appeal in *Pendaftar dan Pemeriksaan Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd* [2000] 2 MLJ 540 reported in [2000] 2 CLJ 573, the issues in this case involving the duty of the RIMV to keep a register of vehicles which was proper and accurate. The Court of Appeal held in a leading judgment of Siti Norma Yaakob JCA as she then was and I quote:
>
> (1) The appellants' argument that there is no duty on them to keep a true a proper register of vehicles registered by them is only tenable if such duty of care is owed to the public at large. This is not the criteria here. The duty to take care sought to be imposed here is owed to an aggrieved party and not to the public at large.
>
> (2) (b) It also indicates that the day-today-operations at the registries of the first and second appellants have not been conducted properly or professionally. For that, the first and the second appellants must be made accountable.
>
> (3) The law should be that the registries maintained by the appellants must contain accurate particulars of all vehicles registered by them. This is essential for the good working of the register system as owners of motor vehicles or anybody else involved in the motor trade conduct searches on the registers on payment of a fee, and clearly, a duty to take care must exist in such a case.
>
> (4) It follows that, every particular information recorded in the files of a registered vehicle is a representation that such information is accurate and reliable as the paying public, particularly owners of motor vehicles, would-be purchasers of such vehicles and those involved in the motor trade like the respondent, rely on such information to conduct private and commercial transactions. It is this concept of general reliance that imposes a duty on the first and second appellants to take care that all information coming from them are accurate.

A (5) It is incorrect for the appellants to maintain that the second appellant was not aware of the purpose of the respondent's visit to the registry, as the act of endorsing the registration book is proof enough that a transfer transaction was afoot That aside, the second appellant ought to have been aware that the act of transferring the car to the respondent's name may not be the last transaction
B conducted by the respondent on the car. The possibility of it being transferred by the respondent to a third party by way of a resale is there and, being a car trader, that possibility is real. The incidence of negligence or negligent statement and misrepresentation, in the circumstances, have been proved.

C [28] I would hold that the aforesaid principles apply to the first defendant in our case and I would hold that the first defendant owed a duty of care to the fifth and sixth defendants to ensure that when searches are made at the land registry, they would be acting on accurate information and a properly maintained and accurate register of titles. I also find from the evidence it shows that the first defendant had not acted in good faith and
D will be disqualified from the protection of s. 22 of the National Land Code.

[32] I turn to the evidence on point and set out the same:

PC: Jadi Encik Fazly setuju bahawa satu endosan data entry telah dimasukkan pada tahun 2002 di dalam sistem komputer?
E

A: Ya betul.

PC: Betul, dan saya rujuk sekarang pada perenggan 3.5 di mana sila bacakan untuk mahkamah Encik Fazly.

A: 3.5 muka surat 88 bundle 3.
F

PC: Ya.

A: "Pengerusi memaklumkan bahawa Hakmilik baru hanya dikeluarkan kepada pemilik setelah pemilik menyerahkan Hakmilik asal kepada Pejabat Tanah di daerah dan pungutan Hakmilik juga dilakukan di daerah. Prosedur ini adaIah tanggungjawab Pejabat Tanah di
G daerah."

PC: Jadi Encik Fazly saya menyatakan bahawa ini adalah tanggungjawab pejabat tanah dalam segala pengeluaran geran Hakmilik?

A: Ya betul.
H

PC: Jadi dalam kes ini Encik Fazly, adakah dokumen Hakmilik keluaran komputer telah dikeluarkan? Dalam kes ini adakah dokumen Hakmilik keluaran komputer telah dikeluarkan, saya letakkan bahawa dokumen Hakmilik keluaran komputer telah dikeluarkan oleh pejabat tanah?
I

A: Betul.

PC: Saya rujuk kepada Encik Fazly minta maaf Encik Fazly saya menyatakan bahawa segala pendaftaran Gadaian memihak kepada plaintif dan pindahmilik kepada pihak ketiga Magna Iron Sdn Bhd adalah teratur?

A: Betul.

PC: Dan sekiranya terdapat apa-apa kecuaian ianya adalah disebabkan oleh D4?

A: Saya tak pasti.

J: Ya? Jawapan?

A: Tidak pasti.

PC: Enck Fazly dalam tindakan ini setelah pendaftaran dilakukan dengan berjaya selepas pengaduan daripada pemilik asal pihak pejabat tanah telah membatalkan Gadaian dan pindahmilik, setuju?

A: Ya setuju.

[33] I find the learned judge was correct in her findings of fact that the appellant was negligent and in breach of its duty of care to the respondent.

[34] The original title held by USESB was valid. There was no evidence to suggest that a notice had been sent to USESB to surrender its existing title in exchange for the computerised title. The computerised title was to be a title in continuation. There was therefore no continuation within the context of the Fourteenth Schedule of the National Land Code.

Good Faith

[35] The appellant attempted to rely on s. 22 of the National Land Code which I now set out:

> **22. Protection of officers.**
>
> No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.

[36] The Land Registry and the accuracy of the particulars it contains is a duty that the appellant owed to the respondent who relied on the same. In my view the balance of the scales of justice comes down in favour of imposing a duty of care on the appellant to the respondent for otherwise the consequences would be more dire than any compensation to be paid out by the appellant, if the confidence of the public in the veracity of particulars at the Land Registry is eroded significantly. From the evidence in this case I find the appellant cannot avail themselves to the protection under s. 22 of the National Land Code as there has been a glaring absence of good faith.

A **Miscellaneous Arguments**

[37] The appellant has raised the point that as the appellant had complied with an order of the High Court to expunge the respondent from the document of title as chargee the appellant cannot be held liable. The cause of action of the respondent is the breach of statutory duty/negligence of the
B appellant which led to the granting of the High Court order and that in my view is actionable. With regards to the issue of damages the order of the learned High Court Judge awarded damages only for the loan sum disbursed pursuant to the impugned charge, therefore the question of economic loss does not arise.

C

[38] I therefore would dismiss this appeal and affirm the order of the High Court dated 14 February 2014 with costs.

Abdul Aziz Abdul Rahim JCA:

[39] Ulu Selangor Estate Sdn Bhd ("USESB") a Malaysian registered
D company, was the original lawful and registered proprietor of two parcels of freehold land in Mukim Rasa, District Ulu Selangor in the State of Selangor. The two parcels of land were described as Geran 53020 Lot No. 886 measuring approximately 242.061 acres and Geran 53021 Lot No. 887 measuring approximately 559.064 acres (collectively referred to as the said
E land).

[40] USESB purportedly entered into a sale and purchase agreement with Magna Iron Sdn Bhd ("MISB") for the sale of the said land. For the purpose of financing the purchase of the said land, MISB took out a loan in the sum of RM19.7 million from the respondent Bank Pertanian Malaysia Berhad. As
F security, the said land was charged to the respondent under two charges (because two separate titles).

[41] The respondent used the services of a legal firm Messrs Zulpadli & Edham for the preparation and execution of the financing and charge documents for the said land. The above two charges were sent by them to
G the appellant for registration together with the memorandum of transfer for the two lots of land.

[42] The two charges were accordingly registered by the appellant on the same day ie, 28 June 2008 under Perserahan No. 57242/2008 and
H Perserahan No. 57243/2008.

[43] Upon being advised by their solicitors that the charges have been successfully registered, the respondent released the loan sum of RM19.7 million to USESB through the solicitors of USESB.

[44] Pursuant to the presentation of the memorandum of transfer and the
I charges on 23 June 2008 a new computerised grant of title was issued by the Land Office on 2 August 2008 showing MISB as the new registered proprietor and that the land was charged to the respondent.

[45] Meanwhile, the original and lawful registered proprietor of the land USESB (the genuine and legally registered proprietor – from hereon will be referred to as 'the true registered owner') had entered into a sale and purchase agreement with a third party for the sale and purchase of five parcels freehold land belonging to it and including the two lots charged to the respondent. It was discovered that the two lots have been transferred unlawfully to the MISB. The true registered owner and its shareholders/directors then filed a civil suit at Kuala Lumpur High Court in Suit No. S3-21-278-2008 ('Suit 278') against the appellant, MISB, the solicitors and several other defendants for, *inter alia*, a declaration that the memorandum of transfer registered on 23 June 2008 by way of Presentation No. 57242/2008 was illegal, null and void and of no effect and for the appellant to reinstate the true registered owner as the registered and lawful owner of the two lots of land.

[46] In Suit 278 the true registered owner claimed that the transfer of the two lots to MISB was done using fake land titles as the original issued documents of title ("IDT") of the two lots were still with the true registered owner. In the same suit also, it was raised that though the land was designated as estate land, there was no approval and consent from the Estate Land Board under s. 214A of the NLC prior to registration of transfer thus rendering the transfer and charge registration illegal and void.

[47] On 30 October 2009, the court allowed the claim by the true registered owner in Suit 278 and granted the declaration sought and ordered that the two lots be re-registered in the two of the true registered owner's name in place of MISB. Apparently, the order was given without any objection by Timbalan Pendaftar Hakmilik Negeri Selangor (one Puan Wan Noraziah bt Kassim) who appeared in court below for the appellant. (The appellant was cited as the eighth defendant in Suit 278). Following the court's order of 30 October 2009, the charge *vide* Representation No. 57243/2008 that was registered in favour of the respondent was struck off and removed from the registration by the appellant.

[48] The respondent in the instant appeal then commenced a suit against the solicitors who were the first, second and third defendants and the appellant who was the fourth defendant. However this court had earlier allowed the appeal by the first, second and third defendants to strike out the respondent's suit against them. Thus, leaving the appellant (the fourth defendant) as the only defendant. So the case in the High Court proceeded only against the appellant.

[49] The respondent grounded its claim against the appellant on alleged negligence and breach of statutory duty and claimed damages and loss in the sum of RM28,681,842 the amount reflected in the charge documents; alternatively the sum of RM19.7 million that was release pursuant to the charge.

[50] The learned High Court Judge found for the respondent and ordered the appellant (ie, the fourth defendant) to pay the respondent RM19.7 million in damages and loss with interest at 4% per annum from date of judgment till full realisation. Hence, this appeal by the fourth defendant before us.

[51] The above facts are culled from the judgment of the learned High Court Judge and are not disputed.

The Respondent's Submission

[52] The revocation of the charge has resulted in prejudice and grave loss to the respondent. The appellant had breached its statutory duty when it registered the transfer of the land to MISB using fake titles and when the original plan of the land was still in the appellant's strong room. The registration of title and charge in favour of MISB is null and void because the transfer of the land in MISB name was done using fake land titles as the original titles were still with the true registered owner. The appellant also had accepted the registration of the documents for transfer and the charge and in issuing a new computerised title notwithstanding that there was no approval and consent from the Estate Land Board, the land being estate land.

[53] Prior to the respondent approving the loan to MISB, the respondent had conducted land search to ensure that the particulars of the land corresponds with the IDT of the true registered owner. In this case the IDT was in the form of computerised title; and the computerised title could only be issued and done by the appellant. The respondent therefore referred to and relied upon the land search and the computerised IDT that the land was registered under the name of the true registered owner. There was no reason for the respondent to doubt on the validity and authenticity of the grant of title as it is under the hand and seal of the appellant.

[54] It was submitted for the respondent that the appellant was negligent in issuing out the USESB computerised registered document of title when in actual fact as testified by DW1 evidenced in the police report of DW1 in Suit 278 that the said computerised document of title is yet to be printed out since the original manual title is still in the possession of the true registered owner and the original plan of the land is still with the appellant in its 'bilik kebal'.

[55] Referring to the provisions of law in respect of the computerised land registration system and the Fourteenth Schedule of the NLC as discussed in *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2013] 1 CLJ 153, it was submitted for the respondent that for the computerised document of title to be issued, the original title must be returned to the appellant to be cancelled and destroyed and the appellant is also required to call upon the proprietor to take delivery of the computer issued document of title and the plan of the land. This did not happen in this case because the original IDT was still remained with the true registered owner and the plan to the land was still in the appellant's 'bilik kebal'.

[56] The other main submission by the respondent is this: The computerised IDT that was presented to the appellant together with the other documents for the registration of the transfer to MISB and the charge to the respondent had used security paper. It is in evidence (of DW1) that the standard security papers are controlled and can be only issued by the appellant. Therefore it was contended that by inference it was the appellant or its servants and officers' negligence that resulted in the issuing of the fake computerised IDT.

[57] Finally, it was submitted by the respondent that the appellant was in breach of the provisions of s. 214A of the NLC when it caused the transfer and the charge of the land without any approval or consent of the Estate Land Board because the land is more than 40 hectares. Learned counsel for the respondent cited the Federal Court's decision in *Toh Huat Khay v. Lim A Chang* [2010] 7 CLJ 261 for this proposition. In that case the Land Administrator saw it fit to register the dealings though the document of title was endorsed with a restriction in interest. The court said the Land Administrator as a public officer would at all time be duty bound to see that dealings in land do not fall foul of the provisions of the Land Code.

[58] The learned High Court Judge found favour with the above submissions by the respondent and granted the respondent/plaintiff's claim against the appellant/fourth defendant.

The Appellant's Submission

[59] The first submission by the learned Assistant State Legal Adviser (ALA) for the appellant is that the respondent has failed to name the tortfeasor who was purportedly negligence and in breach of statutory duty. It was argued that this requirement is mandatory under ss. 5 and 6 of the Government Proceedings Act 1956. Learned ALA cited the case of *Kumpulan Perubatan (Johor) Sdn Bhd v Dr. Mohd Adnan Sulaiman & Anor* [2015] 1 CLJ 471 CA in support. It was argued that since the appellant is a public officer appointed by the State Authority, appellant's liability is vicarious.

[60] The second submission by the appellant is that the act done by the appellant is an administrative act under the NLC. The act complained of is related to registration and transfer. Under ss. 297 and 298 of the NLC, the duty of the appellant is to determine fitness of instrument to be registered and to reject or suspend unfit documents unless the documents consist solely of some formal defect or clerical error. Section 301 of the NLC describes the documents that are fit for registration. It was submitted that in exercising its duty under the NLC, the powers of the appellant is limited by s. 303. Therefore, it was submitted that there is no duty of care owes to the respondent. The learned ALA put reliance on the case of *X (minors) v. Bedfordshire County Council* [1995] 3 All ER 353 which was followed in *David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 3 CLJ 771

where the court said, "that the breach of statutory duty in such a case was not by itself sufficient to give rise to any private law cause of action. For private action to arise out of the alleged breach of statutory duty, the law must a matter of construction, imposed a duty for the protection of a limited class of public and that the Legislature intended to confer on members of that class a private right of action for breach of the duty". The learned ALA also referred to cases involving search at JPJ under the Road Transport Act 1987 which dealt with the issue whether the Director of JPJ is under a duty to ensure the accuracy of the search result. He submitted that on these cases there is no such duty of care on the appellant. In any case it was submitted that the appellant can also seek protection under s. 22 of the NLC.

[61] The third submission by the appellant is that liability cannot be imputed to the appellant because in cancelling the registration of the charge and the transfer and in restoring the true registered owner to the register, the appellant was simply carrying out the court's order in Suit 278. Further, it was submitted that in the previous appeal involving the first to the third defendants in the instant case, the Court of Appeal had made finding that on the facts the fourth defendant (ie, the appellant herein) was defrauded by a third party in issuing the new title of the said land.

[62] The fourth submission by the appellant is that the inference drawn by the learned judge that the fake computerised IDT was issued by the staff or servants of the appellant is unsustainable and not supported by evidence. It was argued that merely because the security paper on which the fake IDT was printed was in the custody and control of the appellant it does not necessarily mean the fake IDT was issued by the office of the appellant using the security paper that was under the control of the appellant. There is no evidence showing the fake IDT was issued using the security paper kept and controlled by the appellant. It was submitted for the appellant that in the absence of irresistible fact pointing to such inference, the inference drawn by the learned judge remains mere conjecture.

[63] With regard to the restriction in s. 214A that no dealing in estate land can be registered unless there is prior approval or consent from the Estate Land Board, it was submitted that it was irrelevant who should obtain the consent or approval because the title was fake. However, s. 214A(4) makes it very clear that the proprietor or co-proprietor of any estate land desiring to transfer convey or dispose of in any manner such land shall together with the person or persons to whom the land is to be transferred conveyed or disposed of jointly submit an application to the Secretary of the Board in Form 14D.

Our Decision

[64] Having heard counsel and having read the appeal records, my learned sister Justice Rohana and I decided to allow this appeal and set aside the High Court's decision. However, my learned brother Justice Dr Prasad has a

different view; His Lordship decided to dismiss the appeal and affirm the learned High Court Judge's decision. Therefore, by majority of 2:1 this appeal is allowed. The followings are our reasons for so deciding.

[65] The respondent's pleaded case is that the appellant as the Pendaftar Hakmilik Selangor has responsibility to ensure and maintain an accurate and reliable system of registration as such the members of the public need not go behind the titles to know how a person becomes a registered owner (see cl. 37 of the respondent's statement of claim). The learned judge, guided by the principles in *Caparo Industries Plc v. Dickman* [1990] 2 AC 605, proceeded to examine this pleading and, having considered the evidence of the respondent as well as that of the appellant and having considered the provisions on computerised land registration system set out in the Fourteenth Schedule of the NLC, concluded as follows:

> From the evidence adduced, I can only concur with the plaintiff that D4 has failed in its duty of care to ensure that the register maintained by it is accurate, reliable and trustworthy. Neither has it complied with the very laws that it has been appointed to administer.

[66] In *Caparo Industries Plc (supra)* it was settled law that a party suing in negligence must establish that the defendant has a duty of care of the nature asserted owing to the plaintiff and that the said duty had been breached by the defendant; and that such breach had caused injury to the plaintiff.

[67] Keeping the above principles in mind, what is the duty of care that the respondent alleged the appellant owes to it and that had been breached by the appellant? On the pleadings referred to earlier, this duty of care seems to be the duty of the appellant to maintain and ensure that the Register of Land Titles in Selangor is, as the learned judge described it, 'accurate, reliable and trustworthy.' In this regard, the learned judge had referred to a passage in *Poh Yang Hong v. Ng Lai Yin & Ors* [2013] 8 CLJ 964 at p. 989 which reads:

> The system of land registration adopted by Parliament and codified in the NLC 1965 is based on the Torrens system of registration. The core principle of this system of registration is that the register is everything. 'The Torrens system strives for simplicity and certitude in transfers of Torrens system land or registered land: *Oh Hiam & Ors v. Tham Kong* [1980] 1 LNS 53 …

[68] In our view this duty to ensure the register is accurate, reliable and trustworthy is a general duty of the office of the appellant to public at large who depends on the register for their land records, and not to the respondent alone which would give the respondent the right of private action against the appellant over and above everybody else. It is also a duty that requires every particular of land presented to the appellant to be entered into the register is entered accurately in accordance with the provisions of the NLC. If the particulars in the instruments presented for registration are entered accurately in the register maintained by the appellant, it follows that the

register is reliable and trustworthy as it will mirror the exact particulars in the instruments that were presented for registration. However, the appellant is not and cannot be said to be responsible for the accuracy of the particulars in the instruments – be it charge documents or memorandum of transfers – presented to his office for registration. For example, the appellant is not required to go behind the memorandum of transfer presented and investigate to satisfy himself that the name of the transferor or transferee stated in the memorandum of transfer is the correct party. At most what is required of the appellant in such circumstances is to ensure that particulars of the transferor and of the land to be transferred (in computerised register) match exactly the particulars printed on the IDT presented together with the memorandum of transfer for purpose of registration. The appellant also is not required to enquire whether the transferor has the authority to effect the transfer unless it is apparent on the face of the IDT that there is a need for such authority. Once this is done and the appellant is satisfied the instrument is fit for registration and of their accuracy, his duty then is to register the instruments and to ensure that those exact particulars are entered into the register, which will then become public record for anyone to inspect by paying a small search fee and obtain a copy of the search result. It is in this light that the duty of the appellant in registering the charge and the transfer in this instant case is administrative in nature as submitted by the learned ALA for the appellant.

[69] It is also pertinent to note in this case that there is no evidence to show that the register kept and maintained by the appellant had been tampered with before the alleged fraudulent transfer. There is no evidence at all to show that the name of the true registered owner in the register had been replaced or altered with the name of the party that presented the charge documents and the memorandum of transfer for registration. On the contrary, the evidence in this case shows that the name of the registered proprietor printed on the computerised IDT that was presented to the appellant together with the charge documents and the MOT is the same as the name of the true registered owner that was on the register at that material time.

[70] It is our view that the learned judge had erred when she concluded that the appellant had failed to maintain and ensure the register is accurate, reliable and trustworthy. The evidence in this case shows nothing is wrong with the particulars in the register immediately prior to the registration of the transfer of the said land to MISB. The learned judge noted in her judgment that the respondent had relied on the land search carried out "wherein D4's records showed that the computerised titles provided by the purported vendor's solicitors (the impugned IDTs) were consistent with the information contained in D4's records that the land was registered in the name USESB and that computerised IDTs had been issued before approving the loan to MISB".

[71] We also observe that when the impugned transfer took place, the computerised land registration system had already been in place and implemented. In fact the migration from the manually issued IDTs to the computerised IDTs has been on going. This is evidence by the issuance of computerised IDTs. The questionable or impugned computerised IDTs that were presented to the appellant at the time of registration had the name of the true registered owner USESB printed on it. Therefore, we find no valid ground for the appellant to suspect that computerised IDT (title in continuation) for the two lands had not been printed because the original plan for original computer issued title for the two lands were still in the appellant's strong room. In our view the court may take judicial notice that the migration from manual registration to computerised land registration is a massive exercise. It involves hundreds if not thousands of land titles of various categories. Thus, it would be reasonable for the appellant to take at face value (considering his duty only administrative) that the computerised IDT for the two lands that were presented to his office together with the other instruments for registration are the computerised IDTs properly and lawfully printed and issued by his office.

[72] PW2 and DW1 had testified that the originals of the computerised documents of title (which were purportedly to be impugned IDTs) were the same documents that were forwarded for the purpose of registration of the transfer and the charge. DW1, the acting Registrar of Land Titles Selangor at the material time, also states in his witness statement that he had received all the relevant documents from DW2 the entry clerk including the verification document (Form A of the Fourteenth Schedule) and two computerised documents of title for the lands (the impugned IDTs). DW1 further testified that:

> Saya juga telah membuat semakan terhadap maklumat hakmilik tanah dan SPTB (Sistem Pendaftaran Tanah Berkomputer) dan membandingkan dengan maklumat yang terkandung dalam Dokumen Hakmilik Keluaran Komputer … saya mendapati semua dokumen/borang yang diperlukan telah pun mencukupi dan mengandungi semua maklumat-maklumat yang dikehendaki.

[73] DW1 also gave evidence that from his naked eye examination, the computerised IDTs that were presented for registration were printed on the security paper just like the one that is normally used to print document of titles. He said at that material time he did not had any doubt as to the genuineness of the IDTs. He did not suspect any forgery at that particular time. DW1's evidence in court is consistent with his police report where he said:

> Saya dapati kesemua dokumen yang telah diserahkan melalui kaunter perserahan pada 23 Jun 2008 jam 2.11.54 petang adalah lengkap dan teratur untuk didaftarkan.

[74] Having reviewed the evidence relied by the learned judge to find the appellant was negligent in that he had failed to maintain and ensure that the register is accurate, reliable and trustworthy, two things must be born in mind. Firstly, there is no evidence that the register had been tampered with prior the registration of the transfer and the charge. Secondly, the particulars of the transferor on the two IDTs were the same as the particulars of the true registered owner in the computerised register. In fact the name of the transferor in the purported impugned IDTs is the same as the name of the true registered owner found in the computerised register. We find those evidence are insufficient to make such conclusion for the reasons we have stated above.

[75] The real issue in this case, in our view is the purported impugned IDTs. The learned judge's finding on this issue can be found at para. 40 of Her Ladyship's judgment; and it is reproduced below for a full appreciation of it:

> 40. It is my finding that D4 was negligent for the following reasons:
>
> (i) It is not disputed that the original IDT of the Land remained with USESB (the original and genuine proprietor) and that the original plans of the Land were still kept in the strong room of D4. It is for this reason that the plaintiffs in the 278 Suit obtained the JID in which, as stated earlier, a declaration was granted that the Memorandum of Transfer and Charge of the Land presented by the plaintiff in this case to D4 on 23.6.2008 was illegal, null and void.
>
> (ii) Paragraph 8 of the Fourteen Schedule was not complied with by D4 in that it had allowed, through its agents or servants, the impugned IDTs to be issued despite the fact that the original plans of the Land were still in the strong room and the impugned IDTs were printed on security paper that was, in the words of DW1 kept under control and could not be accessed by any outsider.
>
> (iii) The only logical and reasonable inference that can be drawn from DW1's testimony is that the impugned IDTs were issued by a servant or agent of D4. This is clear evidence of D4's negligence in failing to ensure that there was in place an effective or secure system of control or supervision of the "kertas keselamatan". The bare averment that the security paper was kept in the strong room is no assurance nor evidence that rules and regulations were in place to maintain the integrity and security of the strong room.
>
> (iv) D4 contends that there was a well-orchestrated plan to cheat D4 through the falsification of the impugned IDTs.
>
> (v) With respect, I cannot agree. As stated earlier, DW1 had stated categorically that the impugned IDTs were printed on security paper which is kept in the strong room of D4. He has asserted positively that no outsider could have access to the security paper. Furthermore DW1 had testified that upon a visual examination of

the impugned IDTs, DW1 (as also DW2 the Entry Clerk) had said he had no cause of doubt the authenticity of the impugned IDTs (see Q&A 18 of DW1's witness statement).

(vi) DW1 had also admitted under cross examination that the impugned IDTs were issued by D4. The only reasonable inference to be drawn from DW1's testimony is that any plan or scheme to cheat can only originate from the office of D4 itself, involving its officers and/or servants or agents of the Registrar of Land Titles who is responsible for the issuance of the computerised IDT.

[76] From the above, it can be seen that the learned judge, in concluding the appellant was negligent, was very much persuaded by the fact that the original IDTs of the two parcels of land was still with the true registered owner USESB at the time of the transfer and the original plan to the land was still in the appellant's strong room. The learned judge also, in our view, was strongly influenced by the fact the impugned IDTs were printed on security paper that is similar to the security paper that was used by the appellant's office to print IDTs and which was kept under control by the appellant in its strong room which is not accessible to outsiders. Premised on these two reasons the learned judge had rejected the appellant's contention that there was well orchestrated plan to cheat the appellant through falsification of the impugned IDTs. Next, the learned judge had drawn the inference that the impugned IDTs were issued by a servant or agent of the appellant and that the appellant had failed to ensure that there was in place an effective or secure system of control or supervision of the 'kertas keselamatan' (the security paper).

[77] In our view, the learned judge's finding and inferences above cannot be justified. The mere fact that security paper is kept in the appellant's strong room which is inaccessible to outsiders and that the impugned IDTs were printed on similar security paper, without more, are insufficient to draw a conclusion that the appellant is negligent to allow the impugned IDTs to be printed on the security paper kept in the appellant's strong room. It would also be not viable to draw the inference that the printing and the issuing of the impugned IDTs were done by the appellant's servants or officers. There must be, in our view, more cogent and concrete evidence to draw such inference. In our opinion, the learned judge was not drawing an inference upon any factual proof when she said that, "any plan or scheme to cheat can only originate from the office of D4 (the appellant) itself, involving its officers and/or servants or agents of the Registrar of Land Titles who is responsible for the issuance of the computerised IDT", but she was making an assumption. The assumption is not justified. There is no evidence in this case to suggest that the impugned IDTs were indeed printed and issued by any of the appellant's servants or officers and that they were indeed printed on security paper obtained from the appellant's strong room.

[78] No servant or officer of the appellant that had been identified as the likely person to have access to the security paper in the strong room. There was also no evidence as to where and how the printing was done. There was no evidence as to what kind of security was in place at the appellant's office regarding access, by the servants or officers of the appellant, to the strong room and the security paper kept therein. In our opinion there must be established some foundation evidence on all these matters before such assumption can be made justifiable. This bring us to the relevance of ss. 5 and 6 of the Government Proceedings Act 1956 (GPA), on the need to have named the tortfeasor which we will discuss later.

[79] In respect of the same issue we are also of the view that the learned judge's conclusion is inconsistent with an earlier finding by this court (in an earlier appeal in this by the first, second and third defendants – Rayuan Sivil No. W-01(IM)(NCVC)-545-09-2011) that in the original suit (ie, Suit 278) by USESB, the true registered owner of the land that there was a fraudulent act by a third party to defraud the true registered owner and the appellant. In its judgment delivered by Ramly Hj Ali JCA, the court wrote:

> The facts established, as per the amended statement of claim, in the original suit, is that the 3rd party had presented to the Suruhanjaya Syarikat Malaysia (SSM) fraudulent and/or forged documents to change the records of USESB, namely the directors, company secretary, shareholders, auditors and the registered address to the 3rd party, being persons having no interest in the share of USESB. The facts also stand that the 3rd party had also defrauded the Pendaftar Hak Milik, Pejabat Tanah dan Galian Negeri Selangor into issuing a new title of the said land; and after successfully defrauding the SSM and the Pendaftar Hak Milik; the 3rd party then executed the memorandum of transfer of MISB. That was registered and duly endorsed by the Pendaftar Hak Milik.

[80] In the same appeal the court also had noted that in the original suit (Suit 278) the respondent (who is also the respondent in the present appeal) had taken the position that the appellant was solely at fault and responsible for the respondent's losses. This is what the court said (at para. 18 of the judgment in Appeal No. 545):

> In the earlier suit filed by the original owners of USESB **(the vendor of the said land),** the Respondent itself had taken the position that the Registrar of Titles was solely at fault and responsible for the loss suffered and that the Respondent, through the Appellants **(ie the legal firm)** had adhered to all prudent banking practices in granting the loan facility and that all documentation was valid. (emphasis added)

[81] Nevertheless, the respondent had failed to take up issue with the appellant in that original suit to commence a third party proceeding against the appellant on the said ground and negligence and prayed for indemnity or compensation. More importantly however, on the respondent's pleadings in the original suit supporting the above position, the court did not make any

finding of negligence or breach of statutory duty by the appellant though the court in the original suit had ordered the appellant (who was the eighth defendant in the suit) to rectify the register and restore the true registered owner USESB to the register and the registered proprietor of the land.

[82] In relation to this issue we are aware that our learned brother Justice Dr Prasad had decided in *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 3 CLJ 271; [2012] 8 MLJ 713 for the plaintiff, *inter alia,* on the following reasons:

> That the title or interest of the fourth defendant on being registered as the registered owner of the said land was obtained by mean of a void instrument and was unlawfully obtained as it had been clearly established that there had been a mistake in the entering of the fourth defendant as the registered proprietor of the said land. I also find that the 14th Schedule of the National Land Code had not been complied with.

[83] And at para. 19 of His Lordship's judgment in the same case His Lordship said:

> [19] On the upshot the mistake of the first, second and third defendants in describing the registered proprietor of the said land as the fourth defendant was unlawful, the application for the issue of a duplicate computerised title on the basis the original title was lost and the subsequent issue of a duplicate title was null and void. The issuing of a computerised title to the fourth defendants as a registered proprietor when the original title to the said land continued to be in the possession of the plaintiff was *ultra vires* as it contravened the provisions of the National Land Code (Amendment Act 1992 (Act 832 of 1992) s. 5A and the 14th Schedule therein and the same was a contravention of s. 340(2)(c) of the National Land Code. It follows therefore any instrument executed by the director of the fourth defendant would be void and insufficient *per se* (see s. 340(2)(b) of the NLC).

[84] Clearly factual matrix of *Uptown Properties Sdn Bhd (supra)* can be distinguished from the facts in the instant appeal. In the former, there is admission of an error by the defendant in the inclusion of the name of the fourth defendant on the computerised IDTs for the said land and that the IDTs were issued to the fourth defendant without complying with the requirement of the Fourteenth Schedule of the NLC in that the fourth defendant was never asked to produce the original IDTs which were manually issued for cancellation and replaced with the computerised IDTs. There was also no evidence of any notice being sent to the plaintiff to surrender the old title in exchange. In the instant appeal however there is no such admission of error or mistake by the appellant. Moreover the presentation of the instruments for registration was purportedly made by the USESB the true registered owner.

[85] As for the non-compliance with the Fourteenth Schedule of the NLC, this issue is irrelevant and never arise at all. The reason being that the appellant never admitted that it had issued the impugned IDTs. Earlier in this judgment we have referred to the evidence of the DW1 that when the impugned IDTs were presented together with the instruments for registration he found that the instruments were fit for registration. The impugned IDTs were discovered only after the true registered owner had made a complaint to the appellant; only then the appellant realised that the computerised IDTs for the land had not been issued yet. There never was any issue of computerised IDTs for the said land by the appellant. All along the issue had been a forged or fake computerised IDTs. This means that the impugned IDTs in this case must in all probability had been forged without the knowledge of the appellant by person or persons unknown long before the void transaction. When and by whom no one knows. There is not an iota of evidence to even allow an educated guess to be made.

[86] With regard to the issue that the respondent has failed to name the tortfeasor raised by the appellant, the law on ss. 5 and 6 of the GPA 1956 is very settled in that it is mandatory to name a tortfeasor if the Government is to be made liable in tort for the negligence or omission by any public officer. Liability can only be attributed to the Government where the officer's act, neglect or default is proved to have established the liability of the officer personally – see *Government Of The State Of Sabah v. Syarikat Raspand* [2010] 7 CLJ 945.

[87] However it was submitted by learned counsel for the respondent that this issue of not naming the tortfeasor was never raised before the High Court and the learned judge never had the opportunity to address the issue in her judgment. This issue was also not raised in the appellant's memorandum of appeal. Therefore nothing more should be said on it.

[88] Next, the learned judge found the appellant not acting in good faith and was in breach of his statutory duty because the appellant had allowed the transfer and the charge to be registered in contravention of s. 214A of the NLC. The respondent submitted that the learned judge's finding is correct. It was argued that each lot of the said land consist of more than 40 hectares; and the category is country land and the condition of land use is agriculture. Therefore by virtue of s. 214A of the NLC the two lots of land are estate lands and thus would require the approval or consent of the Estate Land Board before it can be transferred or be subject to any dealings under the NLC.

[89] We do not think that this submission can be sustained. DW1 had said in his evidence and in his police report that when he received the instruments for registration he found them to be in order and fit for registration after he had made cross check as to the particulars contained there with the information that is found in the computerised land registration system. It is

observed that under s. 214A, it is a joint obligation of both the transferor and the transferee to submit for and obtain the approval or consent of the Estate Land Board before making any dealing with estate land. In this regard we also observe that the transaction (including the preparation of documentations and the search at the Land Registry) was handled by professionals – lawyers/solicitors – engaged by the respondent. The lawyers who handled the transaction were also given a copy of the loan offer letter by the respondent. Paragraph 12 of the letter of offer clearly states that "kelulusan daripada Pihak Berkuasa Negeri hendaklah diperolehi untuk pindah milik bagi mencagarkan tanah …". Being professionals well versed with the law it can reasonably be expected that such statement in the offer letter ought to put the solicitors tasked with handling the documentations and the transaction on enquiry as to the necessary approval that is required before the transaction can be carried out. We accept that there is a different between approval by State Authority and approval by Estate Land Board; the two are separate entities and function separately. But that does not absolve the solicitors handling the conveyance from making the necessary enquiries to ensure that the requirement of the law is complied with. Surely the solicitors in this case cannot deny that the particulars – the category of land, condition of land use and the acreage – printed on the IDTs that were given to them shows that the land is likely to be categorised as estate land. That alone should have triggered the solicitors to make the necessary enquiries as to the approval that would be required. Thus, it follows that when the lawyers presented the instruments for registration the appellant can reasonably expect the documentation have been properly done; and after checking the particulars in the instruments presented for registration against the information pertaining to the land to be registered in the computerised land registration system and found them to be exactly the same, the appellant accepted the instruments as fit for registration. In the circumstances it cannot be said that the appellant had acted in bad faith.

[90] In our opinion, to say a person is acting in bad faith in doing a particular act or acts is to suggest that the act done was deliberate and intentional. It implies some ulterior motive on the part of the person doing the act with intention to cause hurt or injury to another or that he did something which he is not authorised in law to do. But if a person did an act which the person believes is the right thing to do and the person has the authority to do it that cannot be bad faith. Likewise in this case the appellant as the Pendaftar Hakmilik Selangor has the power and authority under the relevant provisions of the NLC to accept and register any instrument presented to him for registration if he is satisfied that the instrument is fit for registration. In the instant case the appellant had given evidence that he found, after checking and verification of the particulars, the instruments presented was fit for registration. He accepted and registered it as it was his duty under the NLC to do. He has no intention, in causing the instruments to be registered, to defraud the true registered land owner USESB or to cause

A loss or injury to the respondent. There is no evidence of bad faith. Similarly when the appellant had to cancel the respondent's registered charge, the appellant was mere carrying out what he was directed to do by the court's order in Suit 278.

B **[91]** In the circumstances therefore we agree with the submission by the learned ALA that the appellant in this case can seek protection under s. 22 of the NLC.

C **[92]** To summarise our views above, we will say this: The respondent pleaded its case against the appellant on the tort of negligence and breach of statutory duty. The acts of the appellant which the respondent said to have contributed to the negligence and breach of statutory duty are three. Firstly, the appellant had allegedly and purportedly allow the impugned IDTs for the two lots of land to be issued using security paper kept in the strong room and under his control and in contravention of the provisions of the Fourteenth Schedule of the NLC in respect of computerised IDTs. Secondly, the
D appellant had accepted for registration unfit instruments and had caused such instruments to be registered when, on the facts of this case, there is no approval or consent from the Estate Land Board. Thirdly, the cancellation of the respondent's registered charge.

E **[93]** The burden is on the respondent to prove negligence and breach of statutory duty by the appellant. For the reasons we have explained in this judgment, we find that the respondent has not discharged this burden. Finally, we are of the view that the fact the appellant had allowed judgment to be entered against it without any objection in the original Suit 278 is not admission of any wrong doing by the appellant. This is because this court in
F an earlier (Appeal 545) where the same respondent as in this instant appeal was also a party had noted that a third party had defrauded the appellant herein to register the transfer and the charge based on the impugned IDTs.

[94] Accordingly, by majority we have allowed this appeal with costs of
G RM20,000 to the appellant.

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